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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-747

UNITED STATES OF AMERICA

v.

CHARLES TRAVIS AUSTIN,
Petitioner.

UNITED STATES OF AMERICA

v.

CHARLES TRAVIS AUSTIN,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

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Constitutional Provisions

U.S. Const. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation 3, 6, 14

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law 3, 11

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws 11

Statutes

18 U.S.C., Sec. 201(b)

(b) Whoever, directly or indirectly, corruptly give, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty 12

18 U.S.C., Sec. 201(c)

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty 3, 12

18 U.S.C., Sec. 201(f)

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official 12

18 U.S.C., Sec. 201(g)

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . 3, 12

18 U.S.C., Sec. 3238

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia 3, 7, 8

28 U.S.C., Sec. 1732

Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act,

transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, micro-film, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence

any document or copy thereof which is otherwise admissible under the rules of evidence 3, 11, 12

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Other Source

McCormick on Evidence, Sec. 10, p. 20 (2d ed. 1972) 10

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner, Charles Travis Austin, prays that a Writ of Certiorari issue to review the Orders of the United States Court of Appeals for the Sixth Circuit entered in the above cases.[1]

[1] This Petition concerns two related cases which were treated together in the Court of Appeals, Sixth Circuit, under Docket Nos. 73-1085 and 73-1086. The District Court ordered the two cases tried together. In No. 73-1085, the Indictment contained 7 counts. On motion of defendant, Counts 5 and 6 were dismissed for lack of competent evidence to sustain the respective counts. The latter indictment contained one count that specifically corrected the defective seventh count in the prior indictment charging a violation of Title 18 USC, Sec. 201(c)(3), that, theretofore had been dismissed.

OPINIONS BELOW

Order on Defendant's Motion for Judgment of Acquittal or for a New Trial entered April 19, 1972, United States District Court, Western District of Tennessee, Eastern Division (App. A, infra).

Judgment and Commitment filed August 24, 1972, in the United States District Court, Western District of Tennessee, Eastern Division (App. B, infra). Judgment and Commitment filed August 24, 1972, in the United States District Court, Western District of Tennessee, Eastern Division (App. C, infra).

The Judgment of Conviction was summarily affirmed by the Court of Appeals for the Sixth Circuit by Order dated June 27, 1973, without opinion. Said Order of the Court of Appeals (App. D, infra) is not reported.

Defendant-Appellant, in the Court of Appeals, promptly filed a Petition for Rehearing In Banc and the Court of Appeals for the Sixth Circuit, by Order dated October 11, 1973, denied the Petition for Rehearing, without opinion. The Order of the Court of Appeals (App. E, infra) denying the Petition for a Rehearing In Banc is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, USC, Sec. 1254(1).

QUESTIONS PRESENTED

1. Can a Grand Jury return a valid indictment based entirely on hearsay testimony and the statements, observations and the most persuasive manifestations of an Assistant United States Attorney?

2. Was Petitioner's rights violated by conducting the trial in the Western District of Tennessee, in violation of 18 USC, Sec. 3238, by a Judge who was without jurisdiction, in violation of the Sixth Amendment of the United States Constitution, when the proof clearly established the fact that Petitioner was first brought into the United States via the Northern District of California, to be tried for a crime alleged to have been committed in the Republic of the Philippines and at Tokyo, Japan?

3. Did the use of purely hearsay testimony, highly prejudicial, inflammatory and repetitious, presented over a period of several days by the prosecution, destroy the integrity of the trial, in violations of Petitioner's rights as provided by the Fifth and Sixth Amendments of the United States Constitution?

4. Whether Exhibit 33 should have been excluded under 18 USC, Sec. 1732, as not meeting the regular course of business requirement?

5. Did the District Court permit plain error in permitting Petitioner to be convicted on both Count 1 and Count 2 of the indictment in that both Counts charge the same transaction and amounted to multiplicity of offenses and the pyramiding of sentences, which practice has been uniformly declared unconstitutional?

STATUTES INVOLVED

The relevant Constitutional Provisions and Statutes involved are set forth in the Table of Contents, supra.

STATEMENT

Charles Travis Austin was charged with violation of 18 USC, Sec. 201(c)(2) and (g) in an indictment alleging that he corruptly and illicitly solicited bribes while performing official

functions as Recreation Officer at the United States Naval Station, Sangley Point, Republic of the Philippines during 1969. Petitioner returned from his duty station in Japan to Travis Air Force Base in California where he was thoroughly searched by customs officials. Then, pursuant to his orders, he was allowed to continue to the Western District of Tennessee. He was indicted on July 7, 1970, by a grand jury. The indictment was based solely on testimony by two investigators who had no direct connection with the accused or the events in question.

At trial, the prosecution depended largely on the testimony of Hisashi Suzuki whose Kyosho Corporation, Santa Ana, California, made a number of sales to the Recreation Division at Sangley Point. Suzuki at first testified to a number of events occurring on October 6, 1969, but later admitted that he was in the United States on that date. Petitioner moved that this testimony be stricken or that a mistrial be declared. These motions were overruled. Further objections were made to admitting records of a foreign corporation located in Tokyo, Japan, as being outside the business records exception to the hearsay requirement. These, too, were overruled.

Petitioner was convicted on five counts. He then moved for a judgment of acquittal notwithstanding the verdict and for a new trial. These motions were then overruled and Petitioner appealed.

In the United States Court of Appeals for the Sixth Circuit the judgment of the lower court was summarily affirmed by Order and defendant-appellant's Petition for a Rehearing In Banc was summarily denied. In neither instant did the Court of Appeals furnish an opinion of a trial involving numerous determinative questions of law and fact that consumed more than eight days of actual trial.

REASONS FOR GRANTING WRIT

1. This case presents the Court with the question whether hearsay testimony can be used before the grand jury in a manner so prejudicial to a defendant as to require reversal.

Petitioner has not contended that no hearsay is permissible before a grand jury, for it is settled otherwise. Petitioner argues only that the grand jury must not be

> misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed.

United States v. Leibowitz, 420 F.2d 39, 42 (2d Cir. 1969).

Petitioner contends that the view announced by the Second Circuit in **United States v. Estepa,** 471 F.2d 1132, 1137 (2d Cir. 1972), has been consistently cited with approval:

> We have been willing to allow ample, many doubtless think too ample, latitude in the needless use of hearsay, subject to only two provisos—that the prosecutor does not deceive grand jurors as to "the shoddy merchandise they are getting so they can seek something better if they wish," United States v. Payton, *supra*, 363 F.2d at 1000 (dissenting opinion), or that the case does not involve "a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted." United States v. Leibowitz, *supra*, 420 F.2d at 42; United States v. Arcuri, 282 F.Supp. 347, 350 (E.D.N.Y.), Aff'd, 405 F.2d 691 (2nd Cir. 1968).

Here, as the court found in **Estepa**, *supra*, it may be that the grand jurors were misled into thinking that they were receiving other than hearsay evidence, although only federal agents, and no one with first-hand knowledge, testified before

the grand jury. This Court should review at this time the questions whether such deception may have occurred in the present case and whether such deception is ground for reversal.

Petitioner asserts that the grand jury indictment on which his trial was based was improper and amounted to denial of "due process of law" demanded by the Fifth Amendment to the United States Constitution. This Court should require the grand jury indictments to be based on the production of the most satisfactory and convincing evidence which the case permits. To hold otherwise would permit the excessive use of hearsay in the presentation of cases to the grand jury, which would tend to destroy the historical function of grand juries in the protection of the innocent from unwarranted prosecution.

Without the production of some substantive evidence or proof before the grand jury, the returning of a true bill of indictment can lead to such a practice and become a form of harrassment which may violate the principle of fundamental "due process" and "equal protection of the law" as announced by the Courts.

The historical function of grand juries and the reason for their inclusion in the federal criminal process has been not only to serve the state by issuing criminal indictments after due investigation, but also to protect the accused from indictments which are not based on reasonable grounds. The Supreme Court has recently spoken of "the necessity to society of an independent and informed grand jury," and has added:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves an invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon

> reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. Georgia, 370 U.S. 375, 390 (1962).

In **Costello v. United States,** 350 U.S. 359 (1956), the Supreme Court emphasized the indictment function of the grand jury.

While **Costello** was an atempt to prevent spurious preliminary hearings on the merits, the reluctance of courts to require any sufficiency of evidence at all before the grand jury can issue an indictment has led to prosecutorial abuse of the grand jury function. **As in the case of the present accused,** prosecutors have demanded and received indictments based on the most spurious hearsay testimony and in some cases on evidence which would not even be admissible at trial. This practice can only subvert the historical function of grand juries and nullify the basic protections of due process afforded by the Fifth Amendment to the United States Constitution.

More recently, in **United States v. Estepa,** *supra*, the Second Circuit reversed a conviction based on a grand jury indictment in which only hearsay testimony was presented. Such an indictment, the court held, "constitutes a fraud on the grand jury and makes a mockery of the Fifth Amendment's grand jury indictment provision."

2. The Court is here presented with the question of the proper interpretation to be given 18 USC, Sec. 3238, regarding venue, which reads in relevant part:

> The trial of all offenses begun or committed . . . out of the jurisdiction of any particular state or district, shall be in the district in which the offender . . . is arrested or first brought.

Petitioner continues to assert that this statute, properly construed requires that he be tried in California.

In the present case, Petitioner was required to notify investigators prior to his departure from the Philippines; military personnel and a military vehicle were used to transport him to him to his departure area; the particular flight and destination were assigned to him by the authorities; he was escorted by military personnel to his departure area and was required to give up his own military documentation; he was required to stand and identify himself to military police who were present on the plane for the sole purpose of insuring that the accused was in fact present on the particular flight; he was landed in a restricted area and subsequently was subjected to a special custodial interview and search by a special agent, Naval Investigative Service, and customs officials; and finally, after his freedom had been thus restricted by this custodial detention, restraint, and investigation, he was permitted to travel to his home, where he was later arrested and again taken into custody.

Petitioner contends that on these facts there existed the type of restraint on liberty contemplated by 18 USC 3238, and that a proper interpretation of the statute, similar to that applied in **United States v. Erdos,** 474 F.2d 157, requires a finding that "arrest" took place for venue purposes in California.

If venue was improper, then the conviction must be reversed. **United States v. Jones,** 174 F.2d 746 (7th Cir. 1949); **United States v. Provoo,** 215 F.2d 531 (2d Cir. 1954). The Court should consider at this time whether a proper construction of 18 USC Sec. 3238 requires a holding that venue in this case was not properly laid in the Western District of Tennessee.

3. The present case presents this Court with criminal conviction based upon inadmissible testimony which was highly prejudicial to Petitioner. The case for the United States was based upon accounts by its witness, Hisashi Suzuki, of alleged criminal acts occurring on a certain date in Tokyo, Japan. When the witness later testified that he had been in the United States rather than in Tokyo on the date in question, it became evident

that his previous testimony had been inadmissible because it was hearsay and/or not based upon first-hand knowledge. Yet the District Court refused to exclude said testimony or declare a mistrial.

Suzuki testified at length to transactions between the Recreation Division, Sangley Point, and the Kyosho Corporation, Tokyo, Japan, and more specifically, to occurrences at the office of the Kyosho Corporation, Tokyo, Japan, on October 6, 1969.

Thus Exhibit 18, which was introduced by the prosecution as a receipt given by petitioner for the kickbacks on October 6, could not have been given by Mr. Suzuki personally. Yet Suzuki testified as to occurrences in Tokyo on October 6.

In **Hinton v. United States,** 91 U.S. App. D.C. 13, 196 F. 2d 605 (1952), the court of appeals reversed a conviction for taking indecent liberties with a young girl. In that case practically the only testimony tending to prove the crime was the testimony of the girl. That testimony contradicted earlier testimony in several respects. In reversing the conviction, the court said:

> It is of course true that self-contradiction by the government's sole eyewitness is not always fatal to the government's case, for circumstances may prove a defendant's guilt beyond a reasonable doubt. But there was no such circumstances here.

196 F.2d at 606.

It is not unfair to say that the testimony of Suzuki is analogous to that of the eyewitness in **Hinton.** Without Suzuki's testimony there is almost no evidence against Petitioner. The fact of Suzuki's self-contradiction, together with the fact that he was discredited as to his personal and business affairs on cross-

examination, renders him unworthy of belief. There are no other circumstances which could prove Petitioner's guilt beyond a reasonable doubt. Thus, this case falls squarely within the **Hinton** rule.

The decision to allow this evidence, without which the Government's case must fail, was clearly erroneous and should be reviewed at this time.

> The Common Law system of proof is exacting in its insistence upon the most reliable sources of information . . . One of the earliest and most pervasive manifestations of this attitude is the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.

McCormick, Evidence, Sec. 10, p. 20 (2d ed. 1972).

The rule in the Sixth Circuit is no less strict, especially in criminal cases.

> "Where plain error has been committed affecting substantial rights of the accused in a criminal case . . ." [and] inasmuch as such . . . [hearsay] evidence was the only evidence sufficient to make a case of [his] guilt, we do not consider its admission as harmless error contemplated by Rule 52(a) of the Rules of Criminal Procedure . . . We are constrained to take notice of it, under Rule 52(b).
>
> The additional evidence against [him] might well arouse suspicion and support a speculative conclusion of his guilt . . . Such speculation, however, is not sufficient to sustain a judgment of conviction.

United States v. Dunn, 299 F.2d 548, 554-55 (6th Cir. 1962) (citations omitted).

It is no justification to say that the witness' command of the language was limited or that his syntax confused himself with

his corporation. Suzuki testified to alleged criminal acts which he could not have witnessed. A conviction based on improper, non-first-hand testimony cannot stand. The Court should review this case at the present time to determine whether the Suzuki testimony was admissible.

However, a reversal in this case need not depend on this ground alone. There are serious constitutional, as well as evidentiary objections to Suzuki's testimony. That testimony, which was clearly hearsay as to the events of October 6, violated Petitioner's rights under the Sixth and Fourteenth Amendments relating to the right to confrontation and cross-examination of adverse witnesses. Evidence was brought against Petitioner by a witness who had no personal knowledge of the events in question. Petitioner had no opportunity to confront or cross-examine witnesses who were the source of knowledge as to the events of October 6. The federal courts, in a series of opinions, have moved to protect this crucial right.

4. The present case squarely presents the Court with the question whether the Federal Business Records Act, 28 USC, Sec. 1732, permits the admission in a criminal trial of a ledger sheet of a corporation not involved in the case, seemingly prepared only for use in court, and not made in the regular course of business.

Petitioner was indicted for and convicted of crimes involving a **California** corporation. Government Exhibit 33 purporting to list allegedly criminal transactions, was introduced in connection with the testimony of the witness Suzuki, and purported to be the record of a different, **Tokyo, Japan,** corporation. It further appeared that this exhibit had been prepared not for business use, but only for use at the trial of this case. Such a document does not meet the requirements of trustworthiness imposed by the Act as prerequisites to breach of the hearsay rule.

It is clear, however, that the first prerequisite, which must be established by the proponents, is that the record was made in the ordinary course of business. **Bisno v. United States,** 299 F.2d 711 (9th Cir. 1961); **Hagans v. Elberman & Bucknall S.S. Co., Ltd.,** 318 F.2d 563 (3d Cir. 1963).

Moreover, it is uniformly held that a document, in order to be admissible, must not have been prepared primarily for use in court. **Palmer v. Hoffman,** 318 U.S. 109, 114 (1943); **United States v. Plisco,** 192 F.Supp. 337 (D. D.C. 1961); **United States v. Johns-Manville Corp.,** 231 F. Supp. 690 (E.D. Pa. 1963). Such records, not having been prepared to be relied upon in the regular conduct of business, are not considered sufficiently trustworthy for use in court.

If the document was not admissible under 28 USC, Sec. 1732, it should not have been permitted in evidence. The Court should review at this time the question whether Sec. 1732 permits the admission of such a document.

5. If this Court takes into account the irrefutable logic of **United States v. Umans,** 368 F.2d 725, 729-30 (2d Cir. 1966), **cert. granted,** 386 U.S. 940, **cert. dismissed as improvidently granted,** 389 U.S. 80, the Court would conclude that Petitioner could not be convicted of violating both 18 USC, Sec. 201(c)(2) and 18 USC, Sec. 201(g) for the same act.

The **Umans** case held that 18 USC, Sec. 201(f) was a lesser included offense of Sec. 201(b), and that concurrent convictions were improper as not in accord with Congressional intent. It will be seen upon examination that Sec. 201(g) and Sec. 201(c), under both of which Petitioner was convicted, are exact reciprocals of Sec. 201(f) and Sec. 201(b), the former sections going to solicitation and receipt, the latter to offering and giving of money. The United States so conceded. Thus, if Sec. 201(f) is included in Sec. 201(b), it must be that Sec. 201(g) is included in Sec. 201(c). **Umans,** therefore, requires **at least** that the sentence as to Sec. 201(g) be vacated in this case.

Moreover, Petitioner continues to assert that vacation of sentence is not adequate, but that the present case is controlled by **Milanovich v. United States,** 365 U.S. 551 (1961). Even if the witness Suzuki's testimony and Exhibit 33 had been properly admitted, still, after **Umans,** there would be evidence of only one crime.

> The judge should have instructed the jury that a guilty verdict could be returned upon either count but not both . . . [S]ince it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know that sentence would have been imposed, a new trial is in order.

Milanovich v. United States, *supra,* 365 U.S. at 554-55.

Whether **Milanovich** controls and requires a new trial on the present facts is a significant question. The case of **United States v. Cohen,** 387 F.2d 803 (2d Cir. 1967), **cert. denied,** 390 U.S. 996, clearly did not vitiate **Umans,** and is significantly distinguished from the present case by the fact that the defendant there had received the "alternative" charge to which Petitioner contends he was entitled.

Petitioner, therefore, contends that this Court should review at this time the question whether **Milanovich** and/or **Umans** apply in this case, and whether jurisdiction should be noted.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of criminal justice. The questions of jurisdiction, due process, the right of Petitioner to a fair and impartial trial upon competent evidence, the irresponsibility of the prosecution, the Government, by introducing the rankest type of hearsay evidence, oral and documentary,

presents resolutions that this Court should determine if we are to expect the public to rely upon our judicial processes.

The failure to observe fundamental fairness essential to the very concept of justice in order to secure Petitioner from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice is in contravention of the due process principle.

Amendment 5, U. S. Constitution;

Simons v. United States, 119 F.2d 539 (cert. denied).

Concerning the method and means of the prosecution in the trial of this case in the District Court, I am reminded of a statement Judge Ely made in his concurring opinion regarding the fair administration of criminal justice in the case of **United States v. Thoresen,** 428 F.2d 654 (9th Cir.), wherein this distinguished jurist said:

> "While I concur in the majority's opinion, I must record my concern over the prosecution's failure to allow reporting and transcription of the grand jury's proceedings. Misgivings arise because the prosecution, by its deliberate conduct, established a basis for suspicion that it demeaned itself by engaging in a 'cat and mouse game' wherein grave personal rights were at stake. * * *"

The effect of the District Court's decisions, the Appellate Court's summary review on the various divisions of responsibility charged with the duty of fairly and impartially administering criminal justice makes this case peculiarly appropriate for the exercise of this Court's discretionary jurisdiction to protect the rights of Petitioner. In so doing, this Court will be curing a malignancy in the judicial processes by taking corrective measures to prevent such abuse and, in so doing, insure respect for our judicial system and the preservation of our democratic processes.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

November 7, 1973.

APPENDIX A

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR FOR NEW TRIAL

(Filed April 19, 1972)

After nine days of trial and another day of argument and deliberation, the jury in this case returned a verdict of guilty on all five counts of the indictment charging defendant with corruptly accepting and receiving bribes, or "kickbacks," thereby committing a fraud against the United States while in the performance of official duties in 1969, as recreation officer at Sangley Point Naval Base, Philippines. Numerous pre-trial motions made by defendant were considered and Counts Five and Six of the original indictment were dismissed. Defendant was furnished a transcript of testimony of witnesses before the grand jury and was granted extensive discovery procedures with respect to the charges placed against him. These were extraordinary in their nature in this Court's experience, but were granted at defendant's special urging in view of the unusual nature of the case. Objections to venue and jurisdiction were considered and the Court ruled that venue was proper under 18 U.S.C. §3238 for trial at Memphis, Tennessee, and that jurisdiction properly lay in this Court.

Constitutional challenges were also considered with regard to the statutes in question, for the violation of which defendant has been found guilty. Objections based upon multiplicity of counts and charges have also been considered prior to trial and under the authority of **Egan v. U.S.**, 287 F.2d 958; **McMullen v. U.S.**, 96 F.2d 574 (D.C., 1938); **U.S. v. Powell**, 420 F.2d 949 (6th Cir., 1970), and **U.S. v. Henderson**, 120 F.2d 592 (7th Cir., 1941), we overruled these objections.

The Court also acted on defendant's motion or request for subpoena duces tecum as to certain matters of evidence prior to trial (See our Order of 12-28-71).

With this background, together with numerous motions and objections during the long trial made by vigorous counsel for defendant (formerly a U. S. Attorney in this Court), we now turn to the grounds for defendant's motion under consideration.

1. Misjoinder of Counts; Pyramiding; Multiplicity; Separate and Distinct Offenses.

Defendant was, in effect, charged with violating two different statutes by committing an act of fraudulently receiving approximately 3,500,000 yen from a Japanese concern and/or individual doing business with the Navy through defendant's official position in violation of his responsibilities and duties.

> "A single transaction may violate several different laws and therefore may expose a defendant to conviction and punishment for two or more offenses. The test to be employed in determining whether this principle may be invoked is whether each offense charged requires proof of a fact which the others do not."

U.S. v. Barnett, 418 F.2d 309 (6th Cir., 1969). Possession of, and transporting the same illegal whiskey, for example, under separate counts has been upheld. **U.S. v. Barnett**, 407 F.2d 1114 (6th Cir., 1969). We find no merit in defendant's contentions here as to separate and distinct offenses, nor in his objections as to multiplicity and pyramiding for essentially the same reasons as were set out at the trial, and as explained herein. Under the theory of **U.S. v. Umans**, 368 F.2d 725, 730 (2nd Cir., 1966), relied on by defendant, the offenses set out in 18 U.S.C. 201(f) is a "lesser included offense of

Sec. 201(b)." Count One here charged a Sec. 201(c) offense and Count Two involved a Sec. 201(g) offense. Although **Umans** is no authority for defendant's contention, nevertheless, this Court intends to make the sentence, if any, run concurrently as to these Counts One and Two.

2. Official Acts.

The proof and evidence adduced by the government clearly established, and it was apparently credible to the jury, that defendant, while acting within his function as recreation division officer, engaged in acts which amounted to the solicitation of bribes and/or kickbacks. He could not otherwise, except by reason of his official capacity, have engaged in such dealings and transactions. He used his influence wrongfully and was himself influenced in his conduct by receiving and arranging for artificial prices which included a tainted amount for himself, all to the detriment of the United States. The act of defendant on or about November 1, 1969, was part and parcel of an act or transaction entered into with Austin while "acting for the government in an 'official function' and the matter in which his decision was to be influenced was 'before him in his official capacity'." **Blunden v. U.S.**, 169 F.2d 991 (6th Cir., 1948). The person offering the unlawful consideration believed Austin had the necessary authority and Austin actually possessed that authority. Defendant's contention that on or about November 1, 1969, he was not acting within the scope of his duties or authorities is likewise not well taken.

3. Hearsay; Testimony of Mr. Suzuki.

This was an unusual case in that the government produced witnesses from Japan, the Philippines, Guam, Europe, California, Washington, Washington, D. C., and

places between. It was apparent, in dismissing several counts of the indictment that the government found it difficult to produce certain other witnesses not subject to subpoena. Over serious and continuing objections of defendant, the principal officer of Kyosho Corporation, a Japanese, Hisashi Suzuki, was permitted to testify not only about transactions and conversations with defendant and his subordinates (who also testified) but also as to certain business records maintained in his Tokyo offices under his over-all supervision and control. Suzuki had some difficulty with English and an interpreter was made available to him and to defendant by the Court, and he was strenuously and at length cross-examined about events and transactions in controversy. His so-called "inconsistent positions" as a witness were gone into thoroughly by defendant and his counsel who had full and complete opportunity to confront and to examine this witness with benefit of pre-trial discovery. There is, in our judgment, no substance to the objections that defendant was in any fashion deprived of Fifth or Sixth Amendment rights or that principles of **Bruton v. U.S.**, 391 U.S. 123, would apply in this case. Testimony about and admission of official records kept and entered in the normal course of business is a well-known exception to the hearsay rule when proper foundation is laid as the government did in this case, in our opinion, with respect to Suzuki and other witnesses.

The records admitted into evidence from Kyosho Corporation met the Wigmore standards of trustworthiness; they were made and calculated for use essentially in the carrying out of Kyosho's business and particularly with regard to its dealings with Austin, which Suzuki and others recognized as being unusual and out of the ordinary. "The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them." **Palmer v. Hoffman**, 129 F.2d 976

(2nd Cir., 1942), affirmed 318 U.S. 109 (1943). Nor was Exhibit 33, which is challenged by defendant, in the nature of an accident report or subjective expression that would justify exclusion as in **Palmer v. Hoffman.** Nor was the evidence admitted merely oral testimony about the contents of records made by some outside or independent appraiser as in **U.S. v. Anderson,** 447 F.2d 833 (8th Cir., 1971).

4. Fair Trial, Due Process.

Some of the records and material that were in the Recreation Office at Sangley Point, Philippines, were not produced at the trial. It was abundantly clear that this Base office had, since the episodes in controversy, been closed and phased out. Government counsel at the Court's direction conferred with defense counsel in advance of the trial on several occasions to present proof expected to be utilized by the prosecution. Both the Court and defendant counsel were assured that no data or information favorable to defendant was concealed, or if available, was failed to be produced. The Court directed the jury under all the circumstances to disregard any charge or circumstance relating to budget impropriety, if any, or failure to carry out budgetary procedures, if any, on the part of defendant or anyone else as this was deemed immaterial to the guilt or innocence of defendant under the several counts of the indictment which the jury did consider. The Court charged that introduction of evidence as to a budget covering the Recreation Office at Sangley Point was not directed towards any alleged misconduct on the part of defendant, but that Count Five charges pertained only to alleged defendant misconduct or improper activity on bidding procedures and alleged improper prepayments for goods not delivered.

That all records dealing with many other transactions engaged in by defendant as Recreation Officer were not

produced did not, in our opinion, deprive defendant of a fair trial. All pertinent documents relating to the particular alleged unlawful conduct of defendant were produced for pre-trial discovery purposes and at the trial itself, including a number of official handwriting specimens used for expert document and handwriting analysis. That no particular document was produced which would tend to be exculpatory as to defendant did not deny him due process, particularly since there was no particular document or paper purporting to relate to the alleged bribe or bribes and irregular procedures employed which defendant indicated was either concealed, misplaced or missing by the government.

Indeed, it was defendant's counsel in his zeal for his client who sometimes persisted in going into all manner of extraneous and irrelevant issues and documents which lengthened the trial and made it sometimes difficult to keep the pertinent issues and controversy in perspective.

The Court overrules defendant's motion based on any asserted departure from proper administration of equal criminal justice under law.

5. Venue.

The Constitution of the United States, Article III, Section 2, Paragraph 3, provides:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Amendment VI provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

Defendant was tried in the Western District of Tennessee, his home, where he was arrested on the basis of an indictment including a number of counts, charging him with serious crimes. He produced at the trial a number of character witnesses nearby. This was authorized under 18 U.S.C. §3238. No objection was made to the Court's conducting of voir dire of prospective jurors and both counsel were asked if further questions were indicated at its conclusion. Such objection or inference of unfairness is not well taken as to assertions about lack of a fair trial by an impartial jury in this judicial district.

6. Expert Witness.

Government counsel was permitted, as was defense counsel, to cross-examine the expert handwriting witness offered by adversary and to go into his experience, background and whether he was to be paid by the party producing him. Defendant's assertion of error in this regard is overruled.

7. Evidence of Pending Civil Proceeding.

Defendant was permitted, over the government's objection, to introduce, if he wished, recitations in a pleading by the government in a pending civil action in this Court for money assertedly due from the defendant to the United States growing out of the same transactions in controversy. This was conditional upon additional or the entire pleadings being made a part of the record if desired by the government, and defendant now objects to this action. The Court may have been in error in indicating permission for any portion of the civil proceedings to be admitted, but since it was not admitted, we find no prejudice to defendant who went fully into Mr. Suzuki's part in the

"fraudulent scheme" and "corrupt performance of official duties", on cross-examination.

8. General.

The Court ruled on a number of the grounds raised for new trial and/or acquittal during the trial. It denied motions for acquittal made at conclusion of prosecution proof and at conclusion of all the evidence. We find the evidence sufficient for a conviction on all counts, and the verdict to be supported by substantial evidence and in accord with the weight of credible proof, if believed by the jury. There was no basis in the evidence in our opinion either for a mistrial or a new trial. All grounds, then, of defendant's motion are determined to be without merit, not persuasive, and the motion is therefore hereby overruled.

/s/ HARRY W. WELLFORD
United States District Judge

Date: 4/17/72

APPENDIX B

JUDGMENT AND COMMITMENT

(Filed August 24, 1972)

United States District Court for the
Western District of Tennessee
Eastern Division

United States of America
v.
Charles Travis Austin
No. Cr. 9181

On this 23rd day of August, 1972 came the attorney for the government and the defendant appeared in person and with counsel, Thomas L. Robinson, Esquire. And after a full hearing, a jury verdict of Guilty having been entered on February 15, 1972 as to Counts 1, 2, 3, and 4 of the Indictment,

It Is Adjudged that the defendant is guilty as charged and has been convicted of the offense of being an officer and employee of the United States acting in an official function under and by authority of the Department of the Navy did corruptly accept, receive, solicit and agree to receive from the Kyosho Corporation, Tokyo, Japan sums of money for himself thereby being influenced to commit a fraud against the United States, said money belonging to the United States and the fruits of a fraudulent plan and scheme whereby purchase orders showing the purchase price of items listed thereon to be an amount substantially greater than the true and correct purchase price for said items were caused to be issued to said Corporation and caused checks to be issued, delivered and negotiated which were payable to said Corporation drawn on an account of

the Bureau of Naval Personnel in amounts falsely shown on said purchase orders to be the true and correct purchase price of items, said action being in performance of official acts in connection with the purchase of supplies and equipment in violation of Title 18, USC, § 201(c)(2) as charged in Counts 1 and 3; and acting in an official capacity unlawfully did accept, receive, solicit and agree to receive for himself sums of money from said Corporation because of official acts in violation of Title 18, USC, § 201(g) as more fully set out in Counts 2 and 4, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two Years on each of Counts 1, 2, 3, and 4 to run concurrently, and said Two Year sentence to run consecutively with a One Year sentence this day imposed in CR-9212, making a total period of imprisonment of Three Years, said sentence to begin on a date to be set by the Court following appeal if an appeal be taken. In the meantime, the defendant may stand on his present bond.

And the defendant through counsel having filed a motion for a new trial, after a full hearing, said motion be and is overruled.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY W. WELLFORD
United States District Judge

Approved

/s/ LARRY E. PARRISH
Assistant United States Attorney

A True Copy. Certified this .... day of August, 1972.

(By) DIANNE SHORT
Deputy Clerk

(Signed) W. LLOYD JOHNSON
Clerk

APPENDIX C

JUDGMENT AND COMMITMENT

(Filed August 24, 1972)

United States District Court for the
Western District of Tennessee
Eastern Division

United States of America
v.
Charles Travis Austin
No. CR. 9212

On this 23rd day of August, 1972 came the attorney for the government and the defendant appeared in person and with counsel, Thomas L. Robinson, Esquire. And after a full hearing, a jury verdict of Guilty having been entered on February 15, 1972 as to the One Count Indictment.

It Is Adjudged that the defendant is guilty as charged and has been convicted of the offense of being an officer and employee of the United States of America under and by authority of the Department of the Navy, corruptly did accept and receive from the Kyosho Corporation, Tokyo, Japan a sum of money in return for being induced to purchase items from said Corporation each purchase being in an amount greater than $1,000.00 for use at the Naval Station without previously seeking bids from other sources, thereby, being induced to cause checks to be issued payable to said Corporation in full payment for said commodities prior to delivery, all in violation of official duties, in violation of Title 18, USC, § 201(c)(3), as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One Year, said One Year sentence to run consecutively with a Two Year sentence this day imposed in CR-9181 making a total period of imprisonment of Three Years. Said sentence to begin on a date to be set by the Court following an appeal if an appeal be taken, and in the meantime, the defendant may stand on his present bond.

It Is Further Ordered and Adjudged that the defendant pay a fine to the United States of America in the amount of One Thousand Five Hundred ($1,500.00) Dollars, said fine being a committed fine in that for the nonpayment of same the defendant surrender himself to the custody of the United States Marshal until payment of same or otherwise released according to law.

And the defendant through counsel having filed a motion for a new trial, after a full hearing, said motion be and is overruled.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY W. WELLFORD
United States District Judge

Approved

/s/ LARRY E. PARRISH
Assistant United States Attorney

A True Copy. Certified this ... day of August, 1972.

(By) DIANNE SHORT
Deputy Clerk

(Signed) W. LLOYD JOHNSON
Clerk

APPENDIX D

NOS. 73-1085- 1086
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 26 1973
JAMES A. HIGGINS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- vs -

CHARLES TRAVIS AUSTIN,

Defendant-Appellant

ORDER

BEFORE: CELEBREZZE and MC CREE, Circuit Judges, and MOYNAHAN,* District Judge.

Appellant was convicted by a jury of five counts of soliciting and accepting bribes as a public official of the United States to defraud the Government and of soliciting and accepting bribes as a public official of the United States to perform an official act, in violation of 18 U.S.C. §§ 201(c)(2), 201(g) (1970). He contends on appeal that

(1) The indictment under which he was charged was void because only hearsay testimony was presented to the grand jury and the jury was misled with respect to the nature of this testimony;

(2) The district court lacked jurisdiction or venue to try appellant because he was "first brought" within the meaning of 18 U.S.C. § 3238 (1970) into the Northern District of California instead of the Western District of Tennessee;

(3) The district court erred in failing to declare a mistrial or to exclude the testimony of the key Government witness because the testimony constituted hearsay and also violated appellant's Sixth Amendment right to confront the witnesses against him;

(4) A page of a corporate ledger sheet was improperly introduced as substantive evidence because it was not prepared in the regular course of business as required by 18 U.S.C. § 1732 (1970);

(5) The convictions of counts one and two amounted to two convictions for the commission of one act, which requires that the convictions be set aside; in the alternative, 18 U.S.C. § 201(g) is a lesser included offense of 18 U.S.C. § 201(c)(2), which requires the vacation of the conviction of count 2.

Upon consideration of the briefs and appendices and of the arguments of the parties, we determine that these contentions are without merit.

Accordingly, the judgment is affirmed.

Entered by order of the court

James A. Higgins
Clerk

APPENDIX E

NOS. 73-1085 - 1086
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- vs - ORDER

CHARLES TRAVIS AUSTIN,

Defendant-Appellant

/

BEFORE: CELEBREZZE and MC CREE, Circuit Judges, and MOYNAHAN,* District Judge.

The petition for rehearing with suggestion for en banc consideration having been filed, and no member of the panel or active judge having requested a vote on the suggestion for en banc consideration, and the petition thereupon having been referred to the original panel for disposition, and it appearing that the contentions urged in the petition have been fully considered and properly determined, upon consideration, it is ORDERED that the petition be, and it hereby is DENIED.

Entered by order of the court

Clerk

*The Honorable Bernard T. Moynahan, Jr., Chief Judge, U. S. District Court for the Eastern District of Kentucky, sitting by designation.

APPENDIX F

In the United States District Court for the Western District of Tennessee, Eastern Division

United States of America, Plaintiff, v. Charles Travis Austin, Defendant.	Cr. No. 9181. 18 USC, §201(c)(2) 18 USC, §201(c)(3) 18 USC, §201(g)

INDICTMENT

(Filed July 7, 1970)

The Grand Jury Charges:

Count One

On or about the 6th day of October, 1969, at Tokyo, Japan,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, did corruptly accept and receive from the Kyosho Corporation, Tokyo, Japan the sum of approximately 3,500,000 yen for himself, thereby, being influenced to commit a fraud against the United States of America, said 3,500,000 yen belonging to the United States of America and the fruits of a fraudulent plan and scheme whereby purchase orders showing

the purchase price of items listed thereon to be an amount substantially greater than the true and correct purchase price for said items were caused to be issued to said Kyosho Corporation by Charles Travis Austin, and Charles Travis Austin caused checks to be issued, delivered and negotiated which were payable to said Kyosho Corporation drawn on an account of the Bureau of Naval Personnel, an agency of the United States of America, in amounts falsely shown on said purchase orders to be the true and correct purchase price of items listed thereon, said purchase orders including, among others, Purchase Orders Nos. 0147-70, dated July 31, 1969; 0271-70, dated September 12, 1969; 0298-70, dated September 26, 1969; 0290-70, dated September 23, 1969, and 0290A-70, dated September 23, 1969, said action being in the performance of official acts by Charles Travis Austin in connection with the purchase of supplies and equipment by said Recreation Division, in violation of Title 18, United States Code, §201 (c)(2).

(nm. $29,700 or nm 15 yrs., or both and may be disqualified from holding any office of honor, trust or profit under the United States)

Count Two

On or about the 6th day of October, 1969, at Tokyo, Japan,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sang-

ley Point, Republic of the Philippines, unlawfully did accept and receive for himself the sum of approximately 3,500,000 yen from Hisashi Suzuki, President, Kyosho Corporation, because of official acts by Charles Travis Austin, to wit: causing to be delivered purchase orders, more fully and explicitly described in Count One of this Indictment, in performance of his official duties in connection with the purchase of supplies and equipment by the Recreation Division of the United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code §201(g).

(nm $10,000., or nm 2 yrs., or both)

Count Three

On or about the 1st day of November, 1969, at Tokyo, Japan,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, did corruptly solicit, seek and agree to receive from the Kyosho Corporation, Tokyo, Japan the sum of approximately Seventeen Thousand, Five Hundred ($17,500.00) Dollars for himself, thereby, being influenced to commit a fraud against the United States of America, said $17,500.00 being an amount belonging to the United States of America and the anticipated fruits of a fraudulent plan and scheme whereby purchase orders showing the purchase price of items listed thereon to be an amount substantially greater than the

true and correct purchase price for said items were caused to be issued to said Kyosho Corporation by Charles Travis Austin, and Charles Travis Austin caused checks to be issued, delivered and negotiated which were payable to said Kyosho Corporation drawn on an account of the Bureau of Naval Personnel, an agency of the United States of America, in amounts falsely shown on said purchase orders to be the true and correct purchase price of items listed thereon, said purchase orders being more fully and specifically described in Count One of this Indictment and in anticipation of the subsequent delivery of three additional Purchase Orders, Nos. 0307A-70, dated October 8, 1969; 0311A-70. dated October 6, 1969, and 0323A-70, dated October 15, 1969, said action being in performance of official acts by Charles Travis Austin in connection with the purchase of supplies and equipment by the Recreation Division of the United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code, §201(c)(2).

(nm $52,500., or nm 15 yrs., or both and may be disqualified from holding any office of honor, trust or profit under the United States)

Count Four

On or about the 6th day of October, 1969, at Tokyo, Japan,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sang-

ley Point, Republic of the Philippines, unlawfully did solicit, seek and agree to receive for himself the sum of approximately Seventeen Thousand Five Hundred ($17,500.00) Dollars from Hisashe Suzuki, President, Kyosho Corporation, because of official acts by Charles Travis Austin, to wit: causing to be issued and delivered purchase orders, more fully and explicitly described in Count One and Count Three of this Indictment, in performance of his official duties in connection with the purchase of supplies and equipment by the Recreation Division of the United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code §201(g).

(nm $10,000., or nm 2 yrs., or both)

Count Five

From on or about May 23, 1969, up to and including on or about September 29, 1969, at Manila, Republic of the Philippines,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970, at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, did accept and receive for himself from J. O. Y. Enterprises, Manila, Republic of the Philippines the sum of approximately 15,318 pesos, thereby, being influenced to commit a fraud against the United States of America, said 15,318 pesos belonging to the United States of America and the fruits of a fraudulent plan and scheme whereby purchase orders showing

the purchase price of items listed thereon to be an amount substantially greater than the true and correct purchase price for said items were caused to be issued to said J.O.Y. Enterprises, Manila, Republic of the Philippines by Charles Travis Austin, said purchase orders including among others, Purchase Orders Nos. 0151-70, dated August 4, 1969; 0302-70, dated September 29, 1969; and 1023-69, dated May 23, 1969, said acting being in the performance of official acts by Charles Travis Austin in connection with the purchase of supplies and equipment by the Recreation Division, United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code, §201(c)(2).

(nm. $11,488.50., or nm 15 yrs., or both and may be disqualified from holding any office of honor, trust or profit under the United States)

Count Six

From on or about May 23, 1969, up to and including on or about September 29, 1969, at Manila, Republic of the Philippines,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970, at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to-wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, unlawfully did accept and receive for himself the sum of approximately 15,318 pesos from Mrs. Yolanda O. Jaucian Cruz, Proprietress, J.O.Y. Enterprises, Manila, Republic of the Philippines, because of official acts by Charles Travis Austin,

to wit: causing to be issued and delivered purchase orders, more fully and explicitly described in Count Five of this Indictment, in performance of his official duties in connection with the purchase of supplies and equipment by the Recreation Division of the United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code, §201(g).

(nm $10,000., or nm 2 yrs., or both)

Count Seven

On or about the 6th day of October, 1969, at Tokyo, Japan,

Charles Travis Austin,

subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, being induced to purchase, among other things, theatre chairs and artificial grass from Kyosho Corporation, Tokyo, Japan, each such purchase being for an amount greater than $1,000.00, for use at the United States Naval Station, Sangley Point, Republic of the Philippines, without previously seeking bids from sources other than said Kyosho Corporation in an effort to ascertain the lowest available price for the above-described commodities, and further, thereby, being induced to cause checks to be issued payable to said Kyosho Corporation in full payment for said above-described commodities prior to the delivery of those commodities to the appropriate division at the United States Naval Station, Sangley Point, Republic of the Philippines, all in

violation of the official duties of Charles Travis Austin, to wit: the requirements of the "Special Services Manual (NAVPERS 15869B), Chapter Five, Paragraph 514" and "Centralized Accounting Handbook for Navy Recreation Funds (NAVSO P-2460), Chapter Two, Paragraph 2380", in connection with the purchase of supplies and equipment by the Recreation Division, United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code, §201(c)(3).

(nm $20,000.00 or nm 15 yrs., or both and may be disqualified from holding any office of honor, trust or profit under the United States)

A True Bill:

.....

Foreman

Date: July 7, 1970

.....

United States Attorney

APPENDIX G

In the United States District Court
For the Western District of Tennessee
Eastern Division

United States of America,
Plaintiff,
v.
Charles Travis Austin,
Defendant.

CR. No. 9212.
18 USC, § 201(c)(3).

INDICTMENT

(Filed April 5, 1971)

The Grand Jury Charges:

Count One

On or about the 6th day of October, 1969, at Tokyo, Japan, Charles Travis Austin subsequently having been arrested on the 8th day of April, 1970 at Michie, Tennessee in the Western District of Tennessee, Eastern Division, being an officer and employee of the United States of America, acting for and on behalf thereof, in an official function, under and by authority of the Department of the Navy, to wit: as the Recreation Division Officer at the United States Naval Station, Sangley Point, Republic of the Philippines, corruptly did accept and receive from the Kyosho Corporation, Tokyo, Japan, approximately 3,500,000 yen in return for being induced to purchase, among other things, theatre chairs and artificial grass from Kyosho Corporation, Tokyo, Japan, each such purchase being for an amount greater than $1,000.00, for use at the United States Naval Station, Sangley Point, Republic of the Philippines, without previously seeking bids from

sources other than said Kyosho Corporation in an effort to ascertain the lowest available price for the above-described commodities, and further, thereby, being induced to cause checks to be issued payable to said Kyosho Corporation in full payment for said above-described commodities prior to the delivery of those commodities to the appropriate division at the United States Naval Station, Sangley Point, Republic of the Philippines, all in violation of the official duties of Charles Travis Austin, to wit: the requirements of the "Special Services Manual (Navpers 15869B), Chapter Five, Paragraph 514" and "Centralized Accounting Handbook for Navy Recreation Funds (Navso P-2460), Chapter Two, Paragraph 2380", in connection with the purchase of supplies and equipment by the Recreation Division, United States Naval Station, Sangley Point, Republic of the Philippines, in violation of Title 18, United States Code, § 201(c)(3).

(nm $20,000., or nm 15 years., or both and may be disqualified from holding any office of honor, trust or profit under the United States)
A True Bill

.....
Foreman

Dated: April 5, 1971

.....
United States Attorney

SUPREME COURT, U. S.
FEB 22 1974
MICHAEL RODAK, JR., CLERK

No. 73-747

In the Supreme Court of the United States

OCTOBER TERM, 1973

CHARLES TRAVIS AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the district court denying a motion for judgment of acquittal or in the alternative for a new trial (Pet. App. A1-A8) is not reported. The court of appeals affirmed petitioner's conviction without opinion (Pet. App. A14-A15).

JURISDICTION

The judgment of the court of appeals (Pet. App. A14-A15) was entered on June 27, 1973. A petition

for rehearing with suggestion for rehearing *en banc* was denied on October 11, 1973 (Pet. App. A16). The petition for a writ of certiorari was filed on November 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether review should be granted to determine if the grand jury may have been misled into believing it had heard eyewitness evidence of petitioner's offenses.

2. Whether the Western District of Tennessee (where petitioner was arrested) was the proper venue of his trial for offenses committed abroad.

3. Whether an exhibit was properly received in evidence as a company record made in the regular course of business.

4. Whether the trial court properly refused to strike certain testimony as hearsay.

5. Whether 18 U.S.C. 201(c)(2) (prohibiting the corrupt acceptance of money by a public official for being influenced to commit a fraud on the United States) and 18 U.S.C. 201(g) (prohibiting the acceptance of money by a public official for or because of an official act performed by him) define distinct, separately punishable offenses though the same transfer of money is involved.

STATUTE INVOLVED

The pertinent provisions of 18 U.S.C. 201 appear in the Appendix, *infra.*

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on five counts (the first four counts of one indictment [1] and a separate one-count indictment) charging him with soliciting and accepting bribes in connection with his duties as a public official, in violation of various provisions of 18 U.S.C. 201(c) and (g) (Appendix, *infra*) (Pet. App. A1, A17-A21, A25-A26).[2] On August 24, 1972, he was

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[1] Three other counts of this indictment (Pet. App. A21-A24) were dismissed and are no longer involved.

[2] Each charge related to the purchase by petitioner from a Japanese corporation of supplies for the naval base at which he was employed. Count One of the first indictment charged that on October 6, 1969, he corruptly accepted 3,500,000 yen from the company, thereby being influenced to commit a fraud on the United States (in violation of 18 U.S.C. 201(c)(2)). The fraud charged, a "kickback" scheme, involved the submission by petitioner to the company of purchase orders for goods showing higher prices than the company actually charged, payment for the goods with government checks drawn in the inflated amounts, and the refunding to petitioner for his own use of the differences between the true and the stated prices (Pet. App. A17-A18). Count Three charged that on November 1, 1969, petitioner corruptly solicited from the company, pursuant to the same scheme, a second payment, in the amount of $17,500 (in violation of the same statutory provision) (Pet. App. A19-A20). Counts Two and Four were

sentenced to two years' imprisonment on each of the four counts of the first indictment, to run concurrently, and to one year on the second indictment, to run consecutively to the two-year term. He was in addition fined $1,500 on the second indictment (Pet. App. A9-A13). The court of appeals affirmed (Pet. App. A14-A15).

Petitioner, a civilian, was the Recreation Division Officer of the United States Naval Station at Sangley Point, Republic of the Philippines. Between August 5 and mid-October 1969 he submitted nine purchase orders to a California affiliate of the Kyosho Corporation ("Kyosho") of Tokyo, Japan, for supplies for the facility. Each order listed the price of the ordered item at a figure substantially higher than Kyosho's actual selling price. The checks with which petitioner paid for the merchandise, all drawn on a government account, were in the inflated amounts shown in the orders. The differences between the true and the stated prices aggregated $27,607 (Tr. 41-47, 60-75, 81-83, 87-132, 139-156, 165-184, 212-

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based on the same transactions, respectively, as Counts One and Three, but charged that the acceptance (of the 3,500,000 yen) and the solicitation (of the $17,500) were "because of official acts by" petitioner (in violation of 18 U.S.C. 201(g)) (Pet. App. A18-A19, A20-A21). See pp. 13-15, *infra*. The single-count second indictment charged that petitioner's acceptance of the 3,500,000 yen was in return for being induced to do acts violative of his official duties, *viz.*, the duties to require competitive bidding and not pay for ordered goods before delivery (in violation of 18 U.S.C. 201(c)(3)) (Pet. App. A25-A26).

213, 216, 251-255, 288-290, 370, 376, 413-419, 477-478, 510, 545-546).[3]

On September 17, 1969, petitioner appeared at the Tokyo office of Kyosho and, in payment of the first two or three of the ordered items, hand-delivered three checks to Hisashi Suzuki, the company president. These checks totaled $21,300, exceeding by $6,447 Kyosho's normal prices for the merchandise (Tr. 43, 46-47, 73, 100-101, 104-105, 216-219, 224-225). Petitioner told Suzuki he planned to use the difference between the total amount of the checks and the cost of the goods to buy playground equipment for the naval station's kindergarten. He declined a suggestion by Suzuki that he buy the equipment from or through Kyosho and apply the excess reflected in the checks toward the purchases, stating that he wanted the difference refunded, in cash. Suzuki agreed to comply with petitioner's request, but said petitioner would have to wait till the checks he had brought had cleared the bank. Petitioner said he would be back later to get the money (Tr. 75-79, 224-228). At petitioner's request, false invoices, showing the prices of the ordered goods to be in the amounts of the checks, were prepared at Suzuki's direction and given to petitioner (Tr. 65-68, 72-75, 94-99, 239-242, 370).

Thereafter, sometime prior to October 6, 1969, Suzuki prepared for petitioner's signature a typed

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[3] "Tr." refers to the partial transcript of the trial on file in the Clerk's office.

acknowledgement of the receipt from Kyosho of 3,500,000 yen,[4] as a refund of moneys paid to the company in connection with purchases which were itemized, and left the document with his wife (the person in charge at Kyosho in Suzuki's absence) for petitioner to sign when he called for the money (Tr. 201-203, 246-250, 380-386, 496, 503, 535-536, 542-543). The receipt, an official business record of the company, bearing petitioner's signature[5] and the handwritten date October 6, 1969, was thereafter returned by Mrs. Suzuki to her husband (Tr. 201-203, 247-250, 380-381, 496-497, 537-538, 542, 1265, 1426).

On November 1, 1969, petitioner again called on Suzuki at his Tokyo office and delivered several additional checks to him (Tr. 120-121, 141-142, 176-177, 254-256). Counting the overpayments reflected in them, the overage that had accumulated since the October 6 refund amounted to $17,500 (Tr. 257). Petitioner told Suzuki that he wanted that sum refunded, as soon as possible, in American currency.

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[4] This sum, the equivalent of $9,900 in American money, included, in addition to the $6,447 excess reflected in the checks petitioner had delivered on September 17, the difference between the actual and the stated prices of an additional purchase, the order for which had been received by Kyosho prior to petitioner's visit, but the check in payment for which was not received by the company till later (Tr. 106-111, 116-117, 247, 249-250, 387-388, 406-407, 514).

[5] The genuineness of the signature was attested both by petitioner's assistant at the naval station and by an expert questioned documents examiner (Tr. 1265, 1426).

Because Kyosho maintained no dollar account in Japan, it was agreed that Satoshi Miyazaki, a Kyosho employee, would be sent to Guam to draw the money from a bank on that island in which the company had such an account and that petitioner would receive the money there from Miyazaki (Tr. 256-257). Miyazaki met petitioner in Guam on November 3, 1969, drew $17,500 in cash from the account, and, after petitioner had receipted for it, gave him the money (Tr. 258-262, 1191-1202).

ARGUMENT

1. In *United States* v. *Estepa*, 471 F. 2d 1132 (C.A. 2), a conviction was reversed and the indictment ordered dismissed because the grand jury had been misled into thinking it was hearing eyewitness evidence whereas in fact the testimony presented had been hearsay. Suggesting that it "may be" that the grand jurors were similarly misled in this case, petitioner, in reliance on *Estepa*, contends that review should be granted to determine whether such deception occurred and, if so, whether reversal is warranted (Pet. 2, 5-7). The contention has no merit because the suggestion on which it is based is incorrect. The transcript of the grand jury proceedings that resulted in the principal (*i.e.*, the multicount) indictment, a copy of which was appended to the government's brief in the court of appeals and is being

lodged herewith,[6] shows that there was no such deception. It appears from the transcript that the witnesses who testified were two agents of the Naval Investigative Service, whose investigations led to the decision to prosecute, and that the hearsay nature of their principal testimony is apparent on the face of the record.[7] It is, of course, not disputed that an indictment is valid though based entirely on hearsay. Cf. *Costello* v. *United States*, 350 U.S. 359.

2. There is no merit to petitioner's contention that he should have been tried in the Northern District of California (Pet. 3, 7-8). 18 U.S.C. 3238 provides that the trial of all offenses committed out of the jurisdiction of any particular State or district shall be in the district in which the offender "is arrested or is first brought." It is undisputed that petitioner was arrested in the Western District of Tennessee.[8] That district was consequently the appropriate venue. It is immaterial that the aircraft by which petitioner

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[6] The transcript was furnished to petitioner before trial (Pet. App. A1).

[7] For example, the testimony of Agent Yamamoto, who conducted the investigation in Japan, consisted in the main of his reporting to the grand jury what he had learned from the Japanese witnesses in his interviews with them and the reading of a written statement furnished him by Suzuki (grand jury transcript, pp. 25-44).

[8] This was also the district of petitioner's residence, as the district court noted, and he produced a number of character witnesses from the area (Pet. App. A7). Thus from the standpoint of convenience to the defense it is evident that no other venue would have been as suitable.

returned to the United States from Japan first landed in the Northern District of California. The record shows that petitioner was not in custody at the time and that his freedom of movement had not theretofore been substantially interfered with.[9] The "first brought" provision of Section 3238 consequently has no relevance. Cf. *United States* v. *Erdos*, 474 F. 2d

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[9] Petitioner, who had changed his employment from the Sangley Point Naval Station to a naval facility in Yokohama, Japan, in late October of 1969, was relieved of his duties at the latter station as of December 31, 1969 (Tr. 703). From then until his departure for the United States in mid-January 1970, he resided with his family, with no restrictions on his freedom, at the Navy Exchange Hotel in Yokohama (Tr. 995-997). His flight to the United States was made at his own expense, in a commercial aircraft that had been chartered by the military authorities to transport military personnel (Tr. 998-999, 1003-1004). After being escorted to the point of departure by a civilian official of the Yokohama facility, to whom he was required to surrender his naval identification card before embarking, he boarded and selected his own seat on the plane (Tr. 999-1002). Prior to takeoff he and two other passengers (military personnel) stood and identified themselves when their names were called by a military policeman (Tr. 992-993, 1002-1003). Following debarkation at the California air terminal and the inspection of his baggage by the customs authorities, petitioner was strip-searched by or under the direction of some persons whom he "took" to be military investigators but whose identity does not appear (Tr. 993-994, 1005-1006). His freedom was not otherwise restricted. He then proceeded unescorted on his way (Tr. 1005-1006). Petitioner's statement that he was subjected to a custodial interview and search at the California terminal by a special agent of the Naval Investigative Service (Pet. 8) is not supported by the record otherwise than as indicated.

157, 160-161 (C.A. 4), certiorari denied, October 9, 1973 (No. 72-1386).

3. Petitioner's contention that Government Exhibit 33 was erroneously received in evidence (Pet. 3, 11-12) is answered in the district court's opinion (at Pet. App. A4-A5), on which, as to this point, we principally rely. The exhibit, an exact reproduction of a page from a Kyosho ledger book showing all the company's transactions with petitioner (Tr. 50-59), was admissible under 28 U.S.C. 1732 as a record made in the regular course of business. Contrary to petitioner's statement that he was indicted for offenses involving a California corporation,[10] the indictments charged and the evidence showed the corrupt acceptance of money by petitioner from the Kyosho Corporation of "Tokyo, Japan" (Pet. App. A17, A19, A25). Petitioner's statement that the exhibit was prepared for use at the trial of this case (Pet. 11) likewise has no record support.

4. Suzuki initially testified that he was at his company's Tokyo office on October 6, 1969, when various transactions between petitioner and the company, described by him, occurred (Tr. 242-250, 380-387, 409). He testified, for example, that petitioner delivered to him on that day a number of purchase orders and some additional checks; that additional invoices,

[10] There was a California company called the Kyosho Corporation, an affiliate of the Tokyo firm (Tr. 288-290, 413-419, 477-478), to which the purchase orders were addressed and the checks were made payable (Tr. 545-546). Except as noted, however, the affiliate figured little in the evidence.

similar to those petitioner had been supplied on his September 17 visit, were prepared at petitioner's request; and that he instructed Mrs. Suzuki to give petitioner the money he had requested, after securing a receipt for it from him (Tr. 242-250). During his redirect examination by government counsel, Suzuki testified that his memory had been refreshed during an overnight recess by a pre-trial statement he had given and that he then recalled that he had not been in Tokyo on the day in question (Tr. 495-496, 533-534). He then explained, clarifying his earlier testimony with respect to the October 6 receipt, that he had typed the receipt on a day prior to the 6th, leaving the date blank, and that Mrs. Suzuki, with whom he had left the receipt, had returned it to him, executed, later (Tr. 496-497, 535-543; cf. Tr. 247-249).[11]

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[11] Suzuki at no time testified that he personally witnessed the payment to petitioner of the 3,500,000 yen referred to in the receipt. Moreover, it appears that Suzuki never intentionally testified that petitioner signed the receipt in his presence. The witness did answer "Yes, sir" to a compound question, asked him by petitioner's counsel, as to whether the receipt had been executed in his presence *and* if he had typed it (Tr. 380-381). However, following his later acknowledgement that he had been mistaken in his testimony that he was in his office on October 6, Suzuki denied, under cross-examination by petitioner's counsel, that he had previously testified that petitioner had signed the receipt in his presence, while reaffirming that he had typed the document (Tr. 535-543). Thus it is fair to infer that Suzuki (whose English was poor and who occasionally needed an interpreter, see Pet. App. A4) meant his aforementioned affirmative answer to apply only to

Immediately after Suzuki's acknowledgement that he had been mistaken as to his whereabouts on October 6, petitioner's counsel, at an extended bench conference, moved for a mistrial on the ground that as a result of the acknowledgement there was a fatal variance between the indictment and the proof, but he made no request that the witness' testimony as to the events of the 6th be stricken as hearsay (Tr. 497-502). The motion for a mistrial was denied (Tr. 500), and petitioner's counsel proceeded to cross-examine Suzuki at length about his change in testimony and about the events as the witness then remembered them (Tr. 522-543). At the close of the government's case in chief, the defense moved that all of Suzuki's testimony relating to the 6th be stricken and that the jury be instructed to disregard it. Petitioner contends that the denial of this motion was error (Pet. 3, 8-11).

Aside, however, from the lateness of the motion, its denial was not improper. A substantial part of the testimony in question related to the delivery by petitioner, on the pertinent date, of various checks and purchase orders, the receipt of which by the company was reflected in the company's records, including the orders themselves and the aforementioned Exhibit 33. Suzuki, as president of the company, had great familiarity with these records and a major part of his overall testimony consisted of his attempts to clarify

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the second part of the question—the inquiry if he had typed the receipt.

for the court and jury their significance in the complex dealings between the company and petitioner. It was a reasonable exercise of discretion, therefore, for the court to permit Suzuki's testimony to stand, qualified by the witness' acknowledgement that he had been in error in the respect mentioned.

In any event, since it was forcefully brought home to the jury, through exhaustive cross-examination, that Suzuki had not personally witnessed either the payment of the 3,500,000 yen to petitioner or petitioner's signing of the receipt therefor—the principal incriminating incidents claimed by the government to have occurred on the day in question—there is, we submit, no substantial basis for a claim of prejudice.

5. Counts One and Two of the principal indictment, contrary to petitioner's final contention (Pet. 3, 12-13), did not charge the same offense. While both counts are based on the same transaction (the receipt by petitioner of the 3,500,000-yen payment), the first count charged that petitioner "corruptly" accepted the money, thereby "being influenced to commit a fraud against the United States" (in violation of 18 U.S.C. 201(c)(2)), whereas the second count charged that the acceptance of the money was "because of official acts by" petitioner (in violation of 18 U.S.C. 201(g)) (Pet. App. A17-A19; see Appendix, *infra*). Proof of the scheme to defraud the United States was necessary under the first count but not under the second; conversely, proof that the

money was in payment for official acts by petitioner was required under the second count but not under the first. The counts, therefore, charged distinct offenses.[12] It is well settled that where the same act or transaction violates distinct statutory provisions, the test to be applied to determine whether distinct offenses are committed is whether each provision requires proof of a fact that the other does not. *Gore* v. *United States*, 357 U.S. 386; *Pereira* v. *United States*, 347 U.S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45; *Blockburger* v. *United States*, 284 U.S. 299, 304. In any event, since the sentences imposed on the two counts are concurrent (Pet. App.

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[12] *United States* v. *Umans*, 368 F. 2d 725 (C.A. 2), certiorari dismissed, 389 U.S. 80, relied on by petitioner, is distinguishable. That case held that the offense defined by 18 U.S.C. 201(f) is a lesser offense included in that defined by 18 U.S.C. 201(b) (368 F. 2d at 730). Sections 201(f) and 201(b) are analogous to Sections 201(g) and 201(c) (involved in this case), the first two provisions applying to the giver, the second two to the receiver, of the proscribed payments (see Pet. iv-vi). However, the particular provision of Section 201(b) involved in *Umans* was paragraph (1) of the three paragraphs contained therein, prohibiting the giving of the payment to the official with intent "to influence any official act." Thus the holding of *Umans* was that paying an official "for or because of" an official act (Section 201(f)) is not a distinct offense from that of paying him "to influence" the act (Section 201(b)(1))—clearly a reasonable determination. Since *Umans* did not involve paragraph (2) of the three paragraphs contained in Section 201(b) (the analog of Section 201(c)(2), involved here), prohibiting paying an official with intent to influence him to commit a fraud on the United States, the decision can be reconciled with the decision in this case.

A9-A10), there is no need for the Court to consider this contention. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16; *United States* v. *Romano*, 382 U.S. 136, 138; cf. *Benton* v. *Maryland*, 395 U.S. 784, 791.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

FEBRUARY 1974.

APPENDIX

18 U.S.C. 201 provides in relevant part:

* * * * *

(c) Whoever, being a public official * * *, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty * * *

* * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * * *

(g) Whoever, being a public official, * * * otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * * * *

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